services covered by Transmittal Nos. 873 and 874 are currently employed by only two parties, Apollo and GTE Service, each on the basis of individually negotiated long-term contracts between Apollo, GTE Telephone and GTE Services. Transmittal Nos. 873 and 874 candidly acknowledged that the tariffs were indeed tailored "to meet the specific needs of" Apollo and GTE Service. (D&J at p. 1.) Thus, any claim that the service had ever been held out generally to the public -- the sine qua non of any common carrier offering -- rather than only to Apollo and GTE Service, is contradicted by the carrier's own statements.[3/]

In somewhat similar circumstances, the Commission has held that the sale and lease of fiber optic facilities did not constitute a common carrier offering subject to Title II regulation. Lightnet, 58 R.R.2d 182 (1985). Citing NARUC I, 525 F.2d at 643, the Commission identified three elements -- all present in the instant case -- which dictated its conclusion that the sale and long-term lease of fiber optic facilities "are not a 'holding out' which would warrant the imposition of Title II obligations," 58 R.R.2d at 186: "Factors that indicate noncommon carrier operations include the existence of long-term contractual relationships, a high level of stability in the customer base, and individually tailored arrangements." Id. at 185.

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[3] Indeed, when it first applied for authority to construct the Cerritos facilities, GTE Telephone itself asserted that the service it now seeks to tariff was a private offering for which tariffing was not required. General Telephone Company of California, 3 F.C.C. Rcd. 2317 (Chief, Common Carrier Bureau, 1988) at ¶ 5. In granting a waiver of the cable/telco cross-ownership restrictions and permitting GTE Telephone to construct the facilities, the Commission -- before which the issue of a need to tariff the service had been raised -- did not require GTE Telephone to file a proposed tariff in connection with its Section 214 application.

In Transmittal No. 873, GTE Telephone essentially filed a tariff intended to reflect some -- but not all -- of the terms of its agreements with Apollo. However, a private contract offering does not become a tariffed common carrier offering merely because the carrier files the terms of the contract with the Commission. The U.S. Court of Appeals has observed in this regard:

> [I]t does not make sense that the filing of the terms of any contract -- no matter how customer tailored -- with the FCC, without more, reflects a conscious decision to offer the service to all takers on a common carrier basis. There is no inherent inconsistency in recognizing that *some* filings of contracts may be just that: the filing of private contracts for private carriage.

Southwestern Bell, supra, 19 F.3d at 1481.

In its June 1, 1994 Consolidated Reply herein, GTE Telephone cited two decades-old decisions which held that carriers seeking to construct lines to offer transmission service to cable television operators on a common carrier basis are required to obtain authority under Section 214 of the Communications Act and to file tariffs for such service. General Telephone Company of California, 13 F.C.C.2d 448 (1968) ("GTE of California"); In the Matter of Commission Order Dated April 6, 1966, Requiring Common Carriers to File Tariffs with Commission for Local Distribution Channels Furnished for Use in CATV Systems, 4 F.C.C.2d 257 (1966) ("Common Carrier Tariff Filings"). As Apollo demonstrated in its filings with the Bureau, however, those decisions are inapposite here.[4/]

[4/] The communications marketplace has changed dramatically since the Commission issued the cited decisions. See generally Telephone Company-Cable Television Cross-Ownership Rules, 7 F.C.C. Rcd. 5781 (1992) ("Video Dialtone"); Competition in the Interstate Interexchange Marketplace, 6 F.C.C. Rcd. 5880 (1990). Even if the cited cases were on point, it would indeed be arguable that the cases are of little, if any, precedential value (or at a minimum should be revisited) in light of such dramatic technological, (continued...)

First, those decisions were made in the context of deciding the scope of federal jurisdiction over cable television facilities and services; the central issue was whether cable operators were engaged in interstate -- as distinct from intrastate -- communications. The Commission decided in the affirmative, and held that facilities provided to cable system operators by telephone companies were subject to the certification requirements of Title II of the Communications Act.

With respect to tariff matters, the Commission's discussion in Common Carrier Tariff Filings was both brief and general:

> It is true, as argued by A.T.& T., that the Commission has disclaimed tariff regulatory jurisdiction over CATV operators. However, such disclaimer followed from our finding that CATV operators are not engaged as communication common carriers within the contemplation of the Communications Act and that therefore such operators are beyond the reach of section 202(b) of the act. We are unable to make any such disclaimer in the case of telephone companies which furnish channels of communication to CATV operators, for the provision of such service is clearly a common carrier undertaking. Thus, the short answer to A.T.& T.'s policy arguments is that Congress has supplied the controlling policy guidance in section 202(b) of the act, recognizing, as it does, that there is a need for regulatory consideration by the central Federal agency of this type of activity by a common carrier linked as it is with broadcasting.

4 F.C.C.2d at 260. In GTE of California, the Commission's focus was once more on the interstate nature of cable television service, and principally on Section 214 certification requirements. While its references to tariff questions were again very truncated, the

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4/ (...continued)
economic, and regulatory changes that have occurred since the cases were decided.

Commission did provide some clarification of what it had meant in its Common Carrier Filings decision:

> In Common Carrier Tariffs for CATV Systems, 4 F.C.C.2d 257, 260 (1966), we held that the furnishing by telephone companies of channels of communications to CATV operators "is clearly a common carrier undertaking" . . . . The telephone company . . . makes no determination as to the television stations to be carried on the CATV system, but merely furnishes the channels of communication to the CATV operator who makes the selection as to the signals to be transmitted over the facilities. Since the telephone companies hold out the channel service for hire, invite all existing and prospective CATV operators to use the facilities, and have indicated a willingness and an ability to carry out this hire, the channel service offerings constitute a common carrier service.

13 F.C.C.2d at 454 (footnote omitted; emphasis added).

It is readily apparent that the decisions GTE Telephone cited do not support its position below that tariffs are necessarily required for any service where Section 214 authority has been granted. For in the abbreviated references the carrier relied on, the Commission indicated only that the interstate common carrier services there at issue -- ones held out "for hire" to "all existing and prospective CATV operators" by carriers with "a willingness and an ability to carry out this hire" -- were tariffable services. The Commission's conclusions there, however, assumed what is absent here: such familiar indicia of common carriage as a general holding out to the public with an intent to serve all takers indiscriminately. Rather, the captioned tariffs proposed a tailored offering for the carrier's affiliate and Apollo only -- an offering of the use of limited now-operating system faciliites incapable of being extended to others. What is here involved is clearly private, not common, carriage. And neither Common Carrier

Tariffs nor GTE of California dealt with such matters. Transmittal No. 873 should have been rejected.

B. The Last-Minute Transmittal No. 893 Did Not Convert the Proposed Service from Private to Common Carriage.

In its 3-sentence discussion of private vs. common carriage in the Order (¶ 33), the Bureau addressed neither the facts, nor the law, nor Apollo's arguments. Instead, the Bureau merely concluded that "as revised" by Transmittal No. 893 (filed two days earlier), Transmittal No. 873 was "not so patently unlawful" that rejection or investigation was warranted. The Bureau's only discernible predicate was a paragraph 32 description of Transmittal No. 893 as one "to remove language from Transmittal No. 873 limiting the offering to one customer, and to make the offering generally available." As a basis for obviating a consideration of Apollo's arguments, Transmittal No. 893 was purely a charade with no substantive import whatever.[5/]

Section 18.1 of the Transmittal No. 873 tariff stated that the service would be "provided to those customers listed in Section 18.4." In turn, Section 18.4(A) specified Apollo as the customer, and contained provisions purporting to reflect certain elements of the specifically-negotiated Apollo/GTE Telephone contracts. Because of its importance here, the initially proposed Section 18.4(A) is reproduced in its entirety:

5/ Even GTE Telephone -- which had never earlier asserted that Transmittal Nos. 873 and 874 were intended or available for anyone other than Apollo and GTE Service -- did not claim that Transmittal No. 893 worked a different result; indeed, GTE Telephone's July 12, 1994 Transmittal No. 893, which included a variety of changes unrelated to private carriage issues, described all such changes only as having been "made in response to directions from the Commission Staff and are made for clarification purposes and to remove unnecessary language."

18.4 Rate and Charges

(A) Apollo CableVision

(1) Provision of 39 channels 275 MHz of bandwidth) of Video Channel Services coaxial network in Cerritos, California.

(2) Apollo CableVision may only utilize Video Channel Service in compliance with the authority granted by the City of Cerritos to Apollo to provide cable television services.

(3) Telephone Company shall not compete with Apollo CableVision, or any permitted successor or assignee, in the provision of Video Programming in Cerritos during the term of this tariff (including any extensions thereof not in excess of seven (7) years beyond the initial term). Provided however that the Telephone Company shall not be prevented by this provision from complying, as a carrier, with any access obligations to video programmers imposed on it by the FCC, other regulatory bodies, or the courts.

(4) If bandwidth capacity in the coaxial bandwidth in excess of 275 MHz should become available, Apollo CableVision, or its successor, has a right of first refusal to the use of any such increase in capacity at the then reasonable market rent for such bandwidth. The Telephone Company shall not provide bandwidth capacity for the purpose of providing Video Programming to another party at a rate that is less than the reasonable market rent offered by the Telephone Company to Apollo CableVision pursuant to this right of first refusal. The Telephone Company shall not lease any portion of the System for the purpose of providing Video Programming to another party at a rental rate that is less than the reasonable market rent offered by the Telephone Company to Apollo CableVision pursuant to this right of first refusal.

(5) Apollo CableVision owns the CATV and TVRO earth station antennas; low noise amplifiers (LNS); low noise blocking converters (LNB); low noise converters (LNC); coaxial cables up to the input of the decombiners/power dividers.

(6) Rates and Charges:

Single Payment Charge - 39 Channels	$4,042,702.00
Monthly Power Charge	2,625.00
New Subscriber Connection - Per Drop	112.50
Subscriber Reconnect - Per Drop	37.50

(7) This service will expire on May 2, 2006; provided, however, that the Telephone Company may terminate Video Channel Services in the event of:

(i) the insolvency or bankruptcy of Apollo CableVision or the making by Apollo CableVision of an assignment for the benefit of creditors, or the appointment without its consent of a trustee or receiver for Apollo CableVision or for a substantial part of its property;
(ii) the institution by or against Apollo CableVision of bankruptcy, reorganization, arrangement or insolvency proceedings;
(iii) the termination of the franchise agreement between Apollo CableVision and the City of Cerritos.

(8) Apollo CableVision has the option to extend the provisions of this tariff coextensive with any extensions granted by the City of Cerritos pursuant to the franchise agreement at a reasonable market rent that includes any future investments in the System and/or operational costs needed to continue the level of service quality required by the City of Cerritos and the Commission

> (9) Subject to the provisions of the franchise agreement between Apollo CableVision and the City of Cerritos, and with the approval of the Telephone Company (which shall not be unreasonably withheld), Apollo CableVision may assign and/or sublease all or any part of its interest hereunder; provided, however, such assignments and/or sublease agreements shall not release Apollo CableVision from any of its obligations to the Telephone Company hereunder.

In Transmittal No. 893, only three cosmetic changes were made to Section 18.4(A):

- The Subsection (A) heading was changed from "Apollo CableVision" to "Programmer for Channels 1 through 39";
- The words in initial subsection (A)(2) were changed from "Apollo CableVision" to "the programmer customer"; and
- Initial subsection (A)(1) was changed to read (new wording underlined):

> The existing programmer for channels 1 through 39 (274 MHz bandwidth) or Video Channel Services coaxial network in Cerritos, California as of July 17, 1994, is Apollo CableVision.

Untouched, among other things, were subsections reflecting GTE Telephone's noncompete agreement with Apollo (subsection (A)(3)), Apollo's contract right of first refusal on the second half of the system bandwidth (subsection (A)(4)), system equipment owned by Apollo (subsection (A)(5)), the rates and charges purportedly based on the Apollo/GTE Telephone contracts (subsection (A)(6)), GTE Telephone's contract termination rights vis-a-vis Apollo (subsection (A)(7)), Apollo's contract option to extend its use of the system (subsection (A)(8)), and Apollo's contract right to assign or sublease its interest in the system to third parties (subsection (A)(9)).

It requires no extended discussion to realize that the Transmittal No. 893 word changes worked no alteration in the substantive nature of the Transmittal No. 873 offering. Indeed, the

changes produce some ludicrous results if credence is given the Order's suggestion that the revisions now make the offering an indiscriminate holding out to the public. For example, Section 18.4(A)(7) would permit GTE to terminate Video Channel Services to other theoretical takers of the service if Apollo became insolvent or filed for bankruptcy!

CONCLUSION

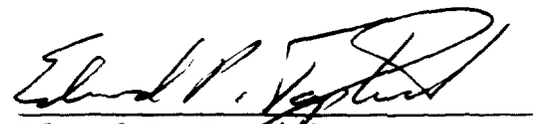
Because Transmittal No. 873 was clearly an unlawful effort to tariff a private carriage offering, the Bureau's refusal to reject the proposed tariff on that basis was contrary to precedent and policy, and should be reversed. Moreover, the Bureau's failure even to consider Apollo's arguments, based on the cosmetic word-changes in the last-minute Transmittal No. 893, was equally plain error.

For the reasons set forth above, and in Apollo's submissions to the Bureau on the subject, Apollo requests an immediate reversal of the Bureau's Order in that regard. Moreover, because such a reversal would moot the need for the protracted proceedings initiated by the Bureau on other matters, Apollo further requests expedited consideration of this appeal. GTE Telephone's July 26, 1994 Motion for Stay (p. 8) essentially demands Commission action on its Application for Review by August 19, 1994; fundamental fairness requires that, if the Commission honors GTE Telephone's request, this application for review should be consolidated, and

concurrently decided, with the carrier's application for review of the same Order.

Respectfully submitted,

APOLLO CABLEVISION, INC.

By: 

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CERTIFICATE OF SERVICE

I, Roberta Schrock, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 1st day of August, 1994, caused a copy of the foregoing APPLICATION FOR REVIEW to be served on the following by first-class U.S. mail, postage prepaid:

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* Hand delivered.

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I, Alicia L. Allen, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 12th day of September, 1995, caused a copy of the foregoing SUPPLEMENTAL APPLICATION FOR REVIEW AND PETITION FOR EXPEDITED CONSIDERATION to be served on the following by first-class mail, postage prepaid:

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